FILE

# Supreme Court of the United States

No.

PETITION OF ALLIS CHALMERS MANUFACTURING COMPANY FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960.

No.

ALLIS-CHALMERS MANUFACTURING COMPANY,
*Petitioner,*

*vs.*

LOCAL 248, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO,
*Respondent.*

## PETITION OF ALLIS-CHALMERS MANUFACTURING COMPANY FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

Petitioners pray that a writ of certiorari issue to review the decision of the Supreme Court of the State of Wisconsin entered in the above-entitled cause[1] on November 29, 1960.

1. The consolidated cases before the Wisconsin Supreme Court were denominated *Local 248, UAW, AFL-CIO* v. *Wisconsin Employment Relations Board*, and *Wisconsin Employment Relations Board* v. *Local 248 UAW, AFL-CIO*. The petitioner, Allis-Chalmers Manufacturing Company was an additional party to the State court appeal.

## REPORT OF OPINIONS BELOW.

The opinion of the Supreme Court of the State of Wisconsin (App., *infra*, p. 36) is reported at 11 Wis. 2d 277 and 105 N. W. 2d 271. The lower court decision (App., *infra*, p. 27) is reported at 2 Lab. Rel. Rep. (46 L. R. R. M.) 2628 (Wis. Circuit Court, Milwaukee County).

## JURISDICTION.

The decision of the Supreme Court of the State of Wisconsin was filed October 4, 1960. A timely motion for rehearing was denied by an order dated November 29, 1960 (App., *infra*, p. 11). Jurisdiction of this court is invoked under 28 U. S. C. 1257 (3).

## QUESTION PRESENTED.

Does the proviso to Section 8(b)(1)(A) of the Labor-Management Relations Act, 1947, create an affirmative federal right of a labor organization to coerce its members where such coercion interferes with statutory employee rights to refrain from concerted activities, so as to preclude enforcement of a state law limiting such coercion?

## STATUTES INVOLVED.

This case involves the following statutes: National Labor Relations Act, as amended (29 U. S. C. 151 *et seq.*).

29 U. S. C. A. § 157:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the

extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

29 U. S. C. A. § 158 (b) (1):

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *"

Wisconsin Employment Peace Act; Wisconsin Statutes, 1959, sections 111.01 *et seq.*

Section 111.04, Wis. Stats.:

"Rights of employees. Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

Section 111.06 (2) (a), Wis. Stats.:

"It shall be an unfair practice for an employee individually or in concert with others:

"(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family."

## STATEMENT OF THE CASE.

This action was commenced by the filing of complaints with the Wisconsin Employment Relations Board alleging that Respondent, Local 248, UAW, had restrained and coerced certain employees of the Allis-Chalmers Manufacturing Company in violation of the Wisconsin Employment Peace Act.

The undisputed facts as found by the Wisconsin Employment Relations Board (App., *infra*, pp. 13-16; 21-25) were that the Respondent, Local 248, during the course of a strike against the West Allis, Wisconsin works of the Allis-Chalmers Manufacturing Company, threatened that union fines up to $100 per day would be imposed against any member who worked during the strike and thereafter actually imposed fines against those employees who crossed the picket line and worked.

Respondent Union, in its Answer and in argument before the Board claimed that the dispute was regulated by the Labor-Management Relations Act, 1947, and that the Board was without jurisdiction. The Board held that the activities of the Respondent Union were of such a nature that they were neither protected nor prohibited by the Labor-Management Relations Act, 1947, and that the threat and imposition of fines against employees for working during the strike constituted coercion and intimidation of such employees in violation of the Employment Peace Act. The Board ordered the Respondent Union to cease and desist threatening any employee of the Company with punishment by the imposition of a fine or attempting to impose or imposing or enforcing any punishment upon any employee of the Company because such employee crossed the picket lines and performed work during the strike.

The Respondent Union sought review of the Order of the Board by petition to the Wisconsin Circuit Court for Mil-

waukee County and the Board filed a cross-petition for enforcement of its Order. The Circuit Court found that the proceeding was outside the scope of the Labor-Management Relations Act, affirmed the findings of the Board both as to jurisdiction and as to the substantive offense, and ordered enforcement of the Board Order.

Respondent Union then appealed to the Supreme Court of the State of Wisconsin. The Supreme Court ruled that the proviso to Section 8(b)(1)(A) of the Labor-Management Relations Act constituted an affirmative grant of rights to labor organizations and that such rights were protected against limitation by state law. The Court further ruled that the threats and imposition of fines which the Employment Relations Board had found to be coercive of the rights of individual employees were protected by the proviso to section 8(b)(1)(A) and that the Board was without jurisdiction to prohibit such coercion. Because of the ruling on the jurisdictional question, the Court found it unnecessary to consider the merits of the dispute and rested its decision solely upon the Federal Constitutional question.

## REASONS FOR GRANTING THE WRIT.

The special and important reasons supporting the grant of certiorari are:

1. The Supreme Court of the State of Wisconsin has determined a substantial Federal question not theretofore determined by this court, has decided the question in a way not in accord with applicable decisions of this court and has decided an important question of interpretation of the National Labor Relations Act which has not been, but should be, settled by this court.

2. The decision sought to be reviewed here has far-reaching effects of an importance well beyond the particular facts and parties involved. If the proviso to section 8(b)(1)(A) is read as an affirmative grant of power for labor organizations to enforce coercive rules against their members free from control by state or federal law, there will be no limit to the arbitrary dictates which those in control of a labor organization can impose upon an unwilling minority. The danger is heightened where, as here and in many industries under union shop agreements, union membership is a condition of employment.

The novel doctrine of the Wisconsin Supreme Court finds no support in the pattern of federal legislation or decisions of this court and is directly contrary to the intention of Congress to protect individual employees in their dealings with labor organizations and employers alike. This Court should review and correct this interpretation of the proviso which would deny to union members everywhere not only the protection of section 8(b)(1)(A), but also the protection of state law limitations on coercive enforcement of union rules in derogation of individual rights.

The decision by the Wisconsin Court conflicts with settled principles of federal-state jurisdiction in the labor-management field as set forth in an extended series of decisions of this Court and establishes the wholly novel proposition that state jurisdiction may be precluded by an exception to the definition of an unfair labor practice under the Labor Management Relations Act.

No claim has been made that the union activity here in dispute is either protected by Section 7 or prohibited by Section 8 of the Federal Act. Thus, this case does not in-

volve the settled rule that state jurisdiction over the labor-management relationship may be precluded where Section 7 creates a federally-protected right or where Section 8 subjects unlawful conduct to regulation by the National Labor Relations Board. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959). Activity of the type in issue here, which is neither protected by Section 7 nor prohibited by Section 8, has always been regarded as within the jurisdiction of state law, *International Union UAWA* v. *WERB*, 336 U. S. 245 (1949), and yet the Wisconsin Supreme Court has ruled that State jurisdiction is precluded because the activity is protected, not by Section 7 of the Federal Act, but by an exception to an unfair labor practice definition in Section 8.

This holding is in direct conflict with the settled rule that an exception to the definition of an unfair labor practice in the federal Act is merely a disclaimer of illegality under federal law and not an affirmative protection. *Algoma Plywood & Veneer Co.* v. *WERB*, 336 U. S. 301 (1949). That case held that the Section 8 proviso excluding union shop agreements from federal regulation did not preclude the application of restrictions imposed by the Wisconsin Employment Peace Act on such agreements. By contrast, the Wisconsin Supreme Court here has deemed itself without jurisdiction to apply the Wisconsin Employment Peace Act to a subject which it considered to be within the scope of a similar exclusionary proviso in Section 8.

This Wisconsin Supreme Court ruling also conflicts directly with the decision in *International Association of Machinists* v. *Gonzales*, 356 U. S. 617 (1958), where, referring specifically to the proviso to Section 8(b)(1)(A), this Court held that union membership matters encompassed by that proviso are outside the scope of the Labor-Management Relations Act and that state tribunals may act in this area applying state law.

The Wisconsin Supreme Court has concluded that the proviso to Section 8(b)(1)(A) not only limits the scope of the unfair labor practices proscribed in that section but goes on to create an affirmative right of a labor organization to enforce its rules in a coercive manner against any individual member free of the limitations of state law. The plain language of the proviso negates the Wisconsin Court conclusions. The words "this paragraph" plainly contemplate that the proviso would not affect other provisions of this statute or other laws, state or federal. The words "impair the right of a labor organization" implicitly contemplate those rights of labor organizations which then existed under state law.[1] Such state law rights would, of course, remain subject to any limitations of state law.

The Wisconsin Supreme Court derived its theory of this "protected" right of unions from certain broad language in three N. L. R. B. decisions, only one of which (*Allen-Bradley Company*, 127 N. L. R. B. No. 8) has had court review. That decision was reversed by the Court of Appeals (Seventh Circuit) in its decision in *Allen-Bradley Company* v. *N. L. R. B.*, No. 13042 (February 9, 1961). The appellate court found no such affirmative protection for labor unions arising out of the proviso. It expressly overruled contentions of the General Counsel for the Board that coercive fines by unions were protected under the proviso to Section 8(b)(1)(A). That case is of particular importance here because it arose from the same background as the companion cases before the Wisconsin Supreme Court.

The unique ruling of the Wisconsin Court is in derogation of previously well-defined employee rights and

1. These words could have no reference to impairment of rights under the Labor-Management Relations Act since that Act conferred no rights on labor organizations as such. The only rights created by the Act are the rights of employees specified in Section 7.

springs from a speculative interpretation of a negative proviso. It overrides affirmative individual rights of employees specifically protected by Congress, and presents an important question in the interpretation and application of the Labor-Management Relations Act. The grant of a writ of certiorari is imperative to correct this serious misconstruction of an important federal statute and to correct this serious limitation on the effective scope of state jurisdiction in the labor-management relations field.

## CONCLUSION.

The Supreme Court of the State of Wisconsin has ruled, in effect, that the proviso to Section 8(b)(1)(A) of the National Labor Relations Act not only negatives illegality under federal law, but also affirmatively spreads a protective cloak over coercive union discipline so that states are powerless to prevent such coercion. This interpretation of an important federal statute is clearly erroneous. Moreover, the decision that Section 8 of the federal Act not only defines illegal conduct but also, by its exclusions, creates affirmative federal rights with which a state cannot interfere is wholly inconsistent with the jurisdictional tests which have been evolved by this Court.

Since the National Labor Relations Board has jurisdiction only over unfair labor practice complaints and representation proceedings and has no machinery or procedure for determining this important question in the administration of the National Labor Relations Act, the erroneous decision of the Wisconsin Supreme Court and its crippling effects upon the individual rights of union members can be corrected only if this court grants a writ of certiorari and reverses the decision below.

**Wherefore,** the Petitioner prays that a writ of certiorari to the Supreme Court of the State of Wisconsin be granted and the decision of such court in these cases be reversed.

Respectfully submitted,

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# APPENDIX.

## Wisconsin Supreme Court.

## DENIAL OF MOTION FOR REHEARING.

And afterwards to-wit on the 29th day of November, A. D. 1960, the following order was entered in this Court,

| | |
|---|---|
| Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, *Appellant*, vs. Wisconsin Employment Relations Board, *Respondent*. | No. 59. |
| Wisconsin Employment Relations Board, *Respondent*, vs. Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, *Appellant*. | No. 60. |

The Court being now sufficiently advised of and concerning the motion of the said respondent, and also motion of the said Allis-Chalmers Manufacturing Company, for a rehearing in these causes, it is now here ordered and adjudged by this Court, that said motions be, and the same are hereby, denied without costs.

## JUDGMENT.

And afterwards to-wit on the 4th day of October, A. D 1960, the same being the 12th day of said term, the following proceedings were had in said cause in this Court:

| | |
|---|---|
| Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, *Appellant,* vs. Wisconsin Employment Relations Board, *Respondent.* | No. 59. Milwaukee Circuit Court |
| Wisconsin Employment Relations Board, *Respondent,* vs. Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, *Appellant.* | Opinion by Justice Currie. No. 60. |

These causes came on to be heard on appeals from the judgments of the Circuit Court of Milwaukee County and were argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgments of the Circuit Court of Milwaukee County, in these causes, be, and the same are hereby, reversed.

And that these causes be, and the same are hereby, remanded to the said Circuit Court with directions in Case No. 59 to vacate and set aside the order of the Wisconsin Employment Relations Board.

STATE OF WISCONSIN.

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD.

## OPINION OF WISCONSIN EMPLOYMENT RELATIONS BOARD

Allis-Chalmers Manufacturing Company,
*Complainant,*
*vs.*
Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO
and
International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO,
*Respondents.*

Case No. XXV
No. 7432
Cw-265
Decision
No. 5314

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Greydon Abendroth, Earl Champeau, Elmer Eggebrecht, Jean Eggebrecht, Harry Gadonas, Bernice Gerow, Alfred Kinney, Richard Leffler, Gerald Moritsch, Alex Olivetti, Leonard Phinney, Paul Roessel, Anthony Sara, Frederick Uebele, Michael Voit, Earl Winter, Henry Wolak, John Wolak, John Wulf,
*Complainants,*
*vs.*
Local 248, United Automobile, Aircraft, and Agricultural Implement Workers of America, AFL-CIO
and
International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO,
*Respondents.*

Case
No. XXVI
No. 7433
Cw-266
Decision
No. 5314

### FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

Complaints of unfair labor practices having been filed by the above entitled Complainants against the Respondent and said complaints having come on for hearing before the Wisconsin Employment Relations Board on the 30th

day of June, 1959, at the Milwaukee County Courthouse, Milwaukee, Wisconsin, the entire Board being present and the Complainants represented by Quarles, Herriott & Clemons, by Mr. John Kamps; Mr. James A. Urdan, Mr. John L. Waddleton and Mr. H. W. Story; and the Respondents by Raskin, Zubrensky & Padden by Mr. Max Raskin; and the matters having been consolidated for the purpose of hearing; and the Board having considered the evidence, arguments and briefs of Counsel, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

## Findings of Fact.

1. That the Complainant Allis-Chalmers Manufacturing Company is a Delaware corporation duly authorized to transact business in the state of Wisconsin and is engaged in the operation of a manufacturing plant in the city of West Allis, Wisconsin.

2. That the individual Complainants:

Greydon Abendroth,
Earl Champeau,
Elmer Eggebrecht,
Jean Eggebrecht,
Harry Gadouas,
Bernice Gerow,
Alfred Kinney,
Richard Leffler,
Gerald Moritsch,
Alex Olivetti,
Leonard Phinney,
Paul Roessel,
Anthony Sara,
Frederick Uebele,
Michael Voit,
Earl Winter,
Henry Wolak,
John Wolak,
John Wulf,

are all employes of the Allis-Chalmers Manufacturing Company, employed at their manufacturing plant in the city of West Allis, Wisconsin.

3. That the Respondent Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, is a voluntary labor organization having its principal office at 811 West Greenfield Avenue, West Allis 14, Wisconsin.

4. That the Respondent International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, is a labor organization with which Respondent Local 248 is affiliated and has its principal office at the city of Detroit, Michigan.

5. That at all times relevant hereto, Respondent Local 248 has been recognized by the Company as the sole and exclusive bargaining agent for certain of its employes including the individually named Complainants at its West Allis works.

6. That at 11:00 in the forenoon on February 2, 1959, the Respondent Local 248 and the Respondent International Union called a strike of all the employes who were represented by Local 248 at the Complainant Employer's West Allis works.

7. That at all times during the strike, the Complainant Employer's shops at West Allis were open and work was available for any employe in the bargaining unit who wished to come to work and the individually named employes in the complaint, crossed the picket lines and performed work for the Complainant Employer at various times during the strike.

8. That at a membership meeting of the Respondent Local 248 on February 7, 1959, Edward J. Merten, President of Respondent Local 248, announced that any employe crossing the picket lines and working during the strike

would be tried by the Union and fined after the strike ended, and further stated at that meeting:

> "After the strike, we will try them and fine them to a point where they'll wish they never crossed the picket line."

and that such statement was carried in the Milwaukee Journal, a newspaper of general circulation in the city of Milwaukee and West Allis, on February 7, 1959.

9. That some of the individually named Complainants who had crossed the picket line and worked during the strike, received letters from the executive Board of the Respondent Local 248 dated February 24, 1959, pointing out that such action by the employe constituted a violation of the constitution and by-laws of the Respondent International Union and Respondent Local Union and subjected each employe to a fine up to $100.00 for each offense; that said letters further stated:

> "Each day of violation may well constitute a separate offense."

10. That each of the individually named Complainants received by certified mail, a letter from Respondent Local 248 under date of May 5, 1959 informing each of said Complainants that they had been charged with violating Local 248 picket lines; that a trial committee would be selected to try them in accordance with the constitution of the International Union; and that they had been placed under suspension by the membership pursuant to the constitution of the International Union.

11. That the Complainant, Allis-Chalmers Manufacturing Company, is engaged in, and the Respondent Union represents employes engaged in a business affecting interstate commerce within the meaning of the Labor Management Relations Act, 1947.

Upon the basis of the above foregoing Findings of Fact the Board makes the following

## Conclusions of Law.

1. That the activities of the Respondent Unions herein are of such nature that they are neither prohibited by, nor protected by the Labor Management Relations Act, 1947, as amended.

2. That the Respondent Local 248 of the United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, by threatening to impose fines or to otherwise discipline employes of the Complainant Employer who crossed the picket lines established by the Respondent Local 248 during the strike conducted by such union against the Complainant Employer and who performed work for the Complainant Employer during the strike has committed an unfair labor practice, in that by the threatening to impose such penalties and by advising the employes that they were to appear for trial, the Respondent Local 248 attempted to coerce and intimidate each of the individual Complainants and other employes similarly situated in the enjoyment of their legal rights including the right guaranteed in Section 111.04 to refrain from engaging in concerted activities for the purpose of collective bargaining.

Upon the basis of the above foregoing Findings of Fact and Conclusions of Law, the Board makes the following

## Order.

That the Respondent Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, immediately cease and desist threatening any employe of the Complainant with punishment by the imposition of a fine or by attempting to impose any punishment upon any employe of the Complainant because such employe crossed the picket lines of the Respondent Union

and performed work for the Complainant Employer during the strike.

Within five (5) days of receipt of copy of this order, notify the Wisconsin Employment Relations Board what steps such Union has taken in compliance therewith.

Given under our hands and seal at the city of Madison, Wisconsin, this 28th day of September, 1959.

Wisconsin Employment Relations Board,
By L. E. Gooding, /s/
L. E. Gooding,
*Chairman*,

J. E. Fitzgibbon, /s/
J. E. Fitzgibbon,
*Commissioner*.

(Seal)

Commissioner Morris Slavney Dissents.

## MEMORANDUM OF DISSENT.

My fellow Board members have concluded that the activities of the Respondents herein are of such nature that they are neither prohibited nor protected by the federal Act.

I disagree and would have found that this Board is precluded from exercising its jurisdiction of the subject matter involved in this litigation. Since I believe that the proviso to Section 8 (b)(1)(A) of the federal Act protects the activities of the Respondents with regard to union members who crossed the picket line during the strike and therefore this Board has no jurisdiction in the matter.

Furthermore, even if I were to be persuaded that this Board has jurisdiction, I would conclude that the activities of the Respondents would not constitute an unfair labor practice under the Wisconsin Employment Peace Act.

My position in this matter is similar to that expressed in *Joseph Carey, et al. v. Lodge 78 of the International Association of Machinists, AFL-CIO*, decided by the Board on April 27, 1959, in Decision No. 5008-B.

Dated at Madison, Wisconsin this 28th day of September, 1959.

Morris Slavney, /s/
Morris Slavney,
*Commissioner.*

STATE OF WISCONSIN.

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD.

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## AMENDED OPINION OF WISCONSIN EMPLOYMENT RELATIONS BOARD.

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Allis-Chalmers Manufacturing Company,
*Complainant.*

*vs.*

Local 248, United Automobile, Aircraft, and Agricultural Implement Workers of America, AFL-CIO

and

International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO,

*Respondents.*

Case No. XXV
No. 7432
Cw-265
Decision
No. 5314-A

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Greydon Abendroth, Earl Champeau, Elmer Eggebrecht, Jean Eggebrecht, Harry Gadouas, Bernice Gerow, Alfred Kinney, Richard Leffler, Gerald Moritsch, Alex Olivetti, Leonard Phinney, Paul Roessel, Anthony Sara, Frederick Uebele, Michael Voit, Earl Winter, Henry Wolak, John Wolak, John Wulf,
*Complainants,*

*vs.*

Local 248, United Automobile, Aircraft, and Agricultural Implement Workers of America, AFL-CIO

and

International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO,

*Respondents.*

Case XXVI
No. 7433
Cw-266
Decision
No. 5314-A

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## AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

The Board having heretofore and on the 28th day of September, 1959, made and filed Findings of Fact, Conclusions of Law and Order, and the parties thereafter, and on

the 22nd day of October, 1959, having filed a stipulation of facts, reflecting certain events occurring after the conclusion of the hearing in the matter and having jointly requested that the Board modify its Findings of Fact, Conclusions of Law and Order;

Now, Therefore, it is

**Ordered.**

That the stipulation of facts, together with the exhibits attached thereto, filed with the Board on October 22, 1959, be and the same hereby are made a part of the record in this matter, and further that the Findings of Fact, Conclusions of Law and Order heretofore made and entered by and the same hereby are modified to read as follows:

**Amended Findings of Fact.**

1. That the Complainant Allis-Chalmers Manufacturing Company is a Delaware corporation duly authorized to transact business in the state of Wisconsin and is engaged in the operation of a manufacturing plant in the city of West Allis, Wisconsin.

2. That the individual Complainants:

Greydon Abendroth,
Earl Champeau,
Elmer Eggebrecht,
Jean Eggebrecht,
Harry Gadouas,
Bernice Gerow,
Alfred Kinney,
Richard Leffler,
Gerald Moritsch,
Alex Olivetti,
Leonard Phinney,
Paul Roessel,
Anthony Sara,

Frederick Uebele,
Michael Voit,
Earl Winter,
Henry Wolak,
John Wolak,
John Wulf,

are all employes of the Allis-Chalmers Manufacturing Company, employed at their manufacturing plant in the city of West Allis, Wisconsin.

3. That the Respondent Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, is a voluntary labor organization having its principal office at 811 West Greenfield Avenue, West Allis 14, Wisconsin.

4. That the Respondent International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, is a labor organization with which Respondent Local 248 is affiliated and has its principal office at the city of Detroit, Michigan.

5. That at all times relevant hereto, Respondent Local 248 has been recognized by the Company as the sole and exclusive bargaining agent for certain of its employes including the individually named Complainants at its West Allis works.

6. That at 11:00 in the forenoon on February 2, 1959, the Respondent Local 248 and the Respondent International Union called a strike of all the employes who were represented by Local 248 at the Complainant Employer's West Allis works.

7. That at all times during the strike, the Complainant Employer's shops at West Allis were open and work was available for any employe in the bargaining unit who wished to come to work and the individually named employes in the complaint, crossed the picket lines and performed

work for the Complainant Employer at various times during the strike.

8. That at a membership meeting of the Respondent Local 248 on February 7, 1959, Edward J. Merten, President of Respondent Local 248, announced that any employe crossing the picket lines and working during the strike would be tried by the Union and fined after the strike ended, and further stated at that meeting:

> "After the strike, we will try them and fine them to a point where they'll wish they never crossed the picket line."

and that such statement was carried in the Milwaukee Journal, a newspaper of general circulation in the city of Milwaukee and West Allis, on February 7, 1959.

9. That some of the individually named Complainants who had crossed the picket line and worked during the strike, received letters from the executive Board of the Respondent Local 248 dated February 24, 1959, pointing out that such action by the employe constituted a violation of the constitution and by-laws of the Respondent International Union and Respondent Local Union and subjected each employe to a fine up to $100.00 for each offense; that said letters further stated:

> "Each day of violation may well constitute a separate offense."

10. That each of the individually named Complainants received by certified mail, a letter from Respondent Local 248 under date of May 5, 1959, informing each of said Complainants that they had been charged with violating Local 248 picket lines; that a trial committee would be selected to try them in accordance with the constitution of the International Union; and that they had been placed under suspension by the membership pursuant to the constitution of the International Union.

11. That the Respondent Local 248, pursuant to the constitution of the Respondent International Union, its By-Laws, Rules and Regulations, on June 13 and July 11, 1959, chose two Trial committees respectively, which Trial committees tried and determined the guilt or innocence of the individual Complainants, and other employes of the Complainant Employer similarly situated, upon charges of conduct unbecoming union members; that on September 12, 1959, said Trial committees issued their findings, decisions and judgment, and found each of the individual Complainants and those similarly situated, guilty of such charges; that each of the individual Complainants, with the exception of those subsequently noted, were each fined $100.00; that individual Complainant Frederick Uebele was fined $95.00; that individual Complainants Bernice Gerow and Michael Voit were fined $90.00; that individual Complainant Harry Gadouas was fined $80.00; and that the other employes similarly situated were fined in amount varying from $15.00 to $100.00.

12. That pursuant to the constitution of the Respondent International Union, its By-Laws, Rules and Regulations, the reports of the two Trial committees were duly adopted by the membership of Respondent Local 248 on September 12, 1959; and that on or about September 18, 1959, the Recording Secretary of the Respondent Local 248 addressed a communication to each of the individual Complainants and other employes similarly situated as follows:

> "You have had a fair trial by the Trial committee, as selected by the members of Local 248, under the provisions of the International Constitution.
>
> The guilt and fine assessed against you for conduct unbecoming a union member has been brought to the membership for their consideration. The membership has upheld the Trial committee to their decisions and fines.

You are, therefore, indebted to Local 248 in the sum of $..... and payment thereof is demanded in order to again be in good standing in Local 248.

You may pay your fine by check or money order made payable to Local 248, UAW, or you may come to settle this matter in person.

Respectfully,

FRANK STARICH,
*Recording Secretary.*"

13. That the Complainant, Allis-Chalmers Manufacturing Company, is engaged in, and the Respondent Union represents employes engaged in, a business affecting interstate commerce within the meaning of the Labor Management Relations Act, 1947.

Upon the basis of the above foregoing Amended Findings of Fact, the Board makes the following

## Amended Conclusions of Law.

1. That the activities of the Respondent Unions herein are of such nature that they are neither prohibited by, nor protected by the Labor Management Relations Act, 1947, as amended.

2. That the Respondent Local 248 of the United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, by threatening to impose fines or to otherwise discipline employes of the Complainant Employer who crossed the picket lines established by the Respondent Local 248 during the strike conducted by such union against the Complainant Employer and who performed work for the Complainant Employer during the strike, and by imposing fines upon said employes, has committed an unfair labor practice, in that by the threatening to impose such penalties and by advising the employes that they were to appear for trial, and imposing fines upon such employes after hearing and trial, the Respondent Local 248

attempted to coerce and intimidate, and did coerce and intimidate, each of the individual Complainants and other employes similarly situated in the enjoyment of their legal rights, including the right guaranteed in Section 111.04 to refrain from engaging in concerted activities for the purposes of collective bargaining.

Upon the basis of the above foregoing Amended Findings of Fact and Amended Conclusions of Law, the Board makes the following

**Amended Order.**

1. That the Respondent Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, immediately cease and desist (a) threatening any employee of the Allis-Chalmers Manufacturing Company with punishment by the imposition of a fine, or (b) attempting to impose or imposing or enforcing any punishment upon any employee of the Allis-Chalmers Manufacturing Company, because such employee crossed the picket lines of the Respondent Union and performed work for the Complainant Employer during the strike.

2. Within five (5) days of receipt of a copy of this Order, notify the Wisconsin Employment Relations Board what steps such Union has taken in compliance therewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 27th day of October, 1959.

WISCONSIN EMPLOYMENT RELATIONS BOARD,

By L. E. GOODING, s
*Commissioner.*

J. E. FITZGIBBON, s
*Commissioner.*

Chairman Morris Slavney Dissents with Memorandum as contained in the Original Order issued by the Board in this matter.

STATE OF WISCONSIN MILWAUKEE COUNTY

CIRCUIT COURT

Branch 5.

**OPINION OF CIRCUIT COURT FOR MILWAUKEE COUNTY, WISCONSIN.**

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Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO,
*Petitioner.*
vs.
Wisconsin Employment Relations Board,
*Respondent.*
} Case No. 284-888.

Wisconsin Employment Relations Board,
*Petitioner.*
vs.
Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO,
*Respondent.*
} Case No. 285-229.

## MEMORANDUM DECISION.

There are two proceedings before the court.

The first (Case No. 284-888) is a petition brought by Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, praying that the decision (No. 5314) of the Wisconsin Employment Relations Board be reviewed to the end that it be reversed and the proceedings held before the Board in Case No. XXV No. 7432 CW-265 and Case No. XXVI No. 7433 CW-266 be dismissed.

The second proceeding is under section 111.07 (7), Stats., for a judgment and decree confirming and enforcing the amended order of the Board made in those cases and proceedings.

These two proceedings involve the same issues and for that reason they are consolidated.

Local 248, a voluntary labor organization, affiliated with International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, was at all times pertinent hereto, recognized by Allis-Chalmers Manufacturing Company as the sole and exclusive bargaining agent for certain of its employees (including employee complainants before the Board) at its West Allis plant.

On February 2nd, 1959, Local 248 and the International Union called a strike of all the employees who were represented by Local 248 at the Employer's West Allis plant.

During the strike the employee complainants before the Board, members of Local 248, crossed the Union's picket lines and performed work for the employer at various times.

A statement by the President of Local 248, at a membership meeting on February 7th, 1959, that any employee crossing the picket lines and working during the strike would be tried by the Union and fined after the strike, which statement appeared in the press, together with letters from Local 248 under date of May 5, 1959, informing employee complainants that they had been charged with violating the Union's picket lines and that a trial committee would be selected to try them pursuant to the International's constitution, formed the grounds for complainants of unfair labor practices under sections 111.06 (2) (a) and 111.06 (3), Stats., filed with the Board by the

Employer (Case No. XXV No. 7432 CW-265) and by nineteen employees (Case No. XXVI No. 7433 CW-266) against the Local and International.

The strike was settled and employees returned to work under a new contract on April 20, 1959.

The employer is engaged in and the Union represents employees engaged in a business affecting interstate commerce within the meaning of the Labor Management Relations Act, 1947, as amended.

The Board, under date of September 28, 1959, made Findings of Fact and Conclusions of law in both cases wherein it concluded that the activities of the Unions were neither prohibited nor protected by the Labor Management Relations Act, 1947, as amended, that the Local had committed an unfair labor practice in that by threatening to impose fines the Local attempted to coerce and intimidate the employee complainants and others similarly situated in the enjoyment of their legal rights including the right guaranteed in section 111.04 to refrain from engaging in concerted activities for the purposes of collective bargaining.

Subsequent to the Board's Findings and Conclusions, and on October 20, 1959, the parties, by counsel, stipulated that facts relative to certain actions taken by the Local since the close of the testimony be incorporated in the record and authorized the Board to amend its Findings, Conclusions and Order of September 28, 1959, in conformity therewith.

Those stipulated facts are that employee complainants and others similarly situated were tried upon charges of conduct unbecoming union members by two Trial Committees, found guilty of the charges and fined in amounts varying from $15.00 to $100.00; that the reports of the Trial Committees were duly adopted by the membership

of Local 248 on September 12, 1959; and on or about September 18, 1959, the Recording Secretary of Local 248 addressed a communication to each of the employee complainants and others similarly situated informing them that the entire membership had upheld the Trial Committee as to their decisions and fines and demanding payment; that all proceedings in connection with the trials and imposition of the fines were in accordance with the Constitution of the International.

Accordingly, the Board amended its Findings to include the stipulated facts and amended its Order directing Local 248 to cease and desist attempting to impose, imposing or enforcing any punishment upon any employee as well as threatening any employee with punishment by the imposition of a fine.

The questions involved in these proceedings are identical to those considered and determined under the fourth and fifth issues in Wisconsin Employment Relations Board, Petitioner, *vs.* Lodge 78, of the International Association of Machinists, AFL-CIO, Respondents, Case No. 281-203, and Lodge 78, of the International Association of Machinists, AFL-CIO, Petitioner, *vs.* Wisconsin Employment Relations Board, Respondent, Case No. 281-417.

The decision in those cases is controlling here.

The court has had the benefit of additional able oral argument and extensive briefs in those proceedings and respectfully submits that there is nothing which would require a change in that decision.

As noted in the decision the court is of the opinion that the activity of the Union here made the basis of complaint under the Wisconsin Employment Peace Act is neither prohibited nor protected under the Labor Management Relations Act. As pointed out by counsel for the Union there is a close identity in the language of Sections 7

and 8(b)(1)(A) of the National Act and Sections 111.04 and 111.06(2)(a) of the Wisconsin Employment Peace Act, respectively. But Section 8(b)(1)(A) of the National Act contains the proviso. Both sides find support for their contentions in the proviso. And as this court understands the decision of the National Board in *Minneapolis Star and Tribune Co.*, 109 N. L. R. B. 727, the imposition of fines by a Union is an internal affair of a labor organization not within the scope of federal prohibition. The proviso, it was there held, is a limitation on the definition of an unfair labor practice in Section 8 (b) (1) (A). An analogous question was presented in *Algoma Plywood & Veneer Co.* v. *Wisconsin Emp. Rel. Board*, 336 U. S. 301, 69 S. Ct. 584, 94 L. Ed. 691, 699, which concerned the proviso in Section 8 (3) relating to union-security agreements. There the court said: "It is argued, therefore, that a state cannot forbid what Section 8 (3) affirmatively permits. The short answer is that Section 8 (3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement. This is the obvious inference to be drawn from the choice of the words 'nothing in this Act * * * or in any other statute of the United States,' and it is confirmed by the legislative history."

Counsel for the Union argues for federal pre-emption on the basis that the National Board has taken jurisdiction in the exact area with which we are here concerned and also that both the National Board and the courts have upheld Section 8 (b) (1) (A). In support of these statements counsel refers to *International Typographical Union*, 86 N. L. R. B. 951; *American Newspaper Publishers Association* v. *N. L. R. B.*, 193 F. (2d) 782; *International Brotherhood of Teamsters, Local 294*, 87 N. L. R. B. 972; as well as *Minneapolis Star and Tribune Company*. The argument is valid only if it may be concluded from these cases that the activity here is protected by the proviso to Section 8(b)

(1) (A). This court is of the opinion that these cases are not authority for such ruling. The question was not before the court in *United Automobile, A. & A. I. Workers* v. *Woychik*, 5 Wis. (2d) 528. And in *International Association of Machinists* v. *Gonzales*, 356 U. S. 617, 78 S. Ct. 923, 2 L. Ed. (2d) 1018, it was held that states are free to regulate matters within the scope of the proviso. It is true, as counsel points out that the case involved a contractual right of a union member with respect to his union and not a public right. This counsel states is a material difference which distinguishes *Gonzales* from the instant case. The court has given consideration to this contention but concludes from a study of the *Gonzales* case that the reference to respondent's private right was to distinguish the remote possibility of conflict with a federal unfair labor practice under Section 8 (b) (2) of the National Act. The court is of the opinion that it is not a distinguishing difference.

The court is of the further opinion that there is no federal pre-emption here, under the second *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 241, 79 S. Ct. 773, 779, 3 L. Ed. (2) 775. There the court said:

> "At times it has not been clear whether the particular activity regulated by the States was governed by Section 7 or Section 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board."
>
> * * * * * *
>
> "* * * The adjudication in California has throughout been based on the assumption that the behavior of the petitioning unions constituted an unfair labor practice."

If the court is correct in its impression of the *Gonzales* case then the activity here is not arguably subject to Section 7 or Section 8 of the National Act. And the National Labor Relations Board has made its decision in the first instance. *Minneapolis Star and Tribune Company*, supra.

The court is also of the opinion that there is no pre-emption here under the proviso to Section 101 (a) (2) of the Labor-Management Reporting and Disclosure Act of 1959.

Most cases cited by counsel for the Union in connection with union discipline as specifically protected were also cited in the Lodge 78 cases. All have been considered.

In the reply brief it is the position of counsel for the Union that the mere fact that the National Board ruled that the activity of the Union was not prohibited under the proviso to Section (b) (1) (A) (*Minneapolis Star and Tribune Company*) does not cede to the states jurisdiction over the subject matter, citing *Guss* v. *Utah Labor Relations Board*, 353 U. S. 20, 77 S. Ct. 607, 1 L. Ed. (2d) 618. With this view the court respectfully differs.

In the *Guss* case the Supreme Court of Utah had held that the Utah Labor Relations Board had jurisdiction over unfair labor charges filed by the union (5 Utah (2) 68, 296 P. (2d) 733). On appeal that decision was reversed, the court holding that the State Board had no power to deal with unfair labor charges falling within the jurisdiction of the National Board where the latter had declined to exercise its jurisdiction but had not ceded jurisdiction to the State Board. The question presented by the case, as well as by *Amalgamated Meat Cutters, etc.* v. *Fairlawn Meats, Inc.* and *San Diego Building Trades Council* v. *Garmon*, supra, the court said, was whether Congress, by vesting in the National Board, jurisdiction over labor relations matters affecting interstate commerce, "has com-

pletely displaced state power to deal with such matters" where the National Board has declined to exercise its jurisdiction or obviously would decline to exercise its jurisdiction, but has not ceded jurisdiction pursuant to Section 10 (a) of the National Act. The uncontroverted premises were: (1) employer's business affected interstate commerce and the National Labor Relations Board had jurisdiction, (2) the National Act deals with the conduct charged to the employer which was the basis of the state tribunals' actions, (3) the National Board had not entered into any agreement ceding jurisdiction to the State Board pursuant to Section 10 (a) of the National Act. On these facts the court concluded:

> "We hold that the proviso to Sec. 10 (a) is the exclusive means whereby States may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board. We find support for our holding in prior cases in this Court. In *Amalgamated Asso. S. E. R. M. C. E.* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 397, 398, 95 L. ed. 364, 377, 71 S. Ct. 359, 22 A. L. R. (2d) 874, the Court said: 'The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co.* v. *New York Labor Board*, 330 U. S. 767 (1947), and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states. Congress knew full well that its labor legislation 'preempts the field that the act covers insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative. (Footnotes omitted.)' "

In the opinion of this court the principle of the *Guss* case has no application in a situation where the federal substantive law does not deal with a particular kind of conduct. The National Board has made its determination in

*Minneapolis Star and Tribune Company* that the activity here involved is not prohibited by federal law.

The order of the Wisconsin Employment Relations Board is affirmed and the petition of the Board for judgment confirming and enforcing the order is granted.

(All without costs.)

An order in conformity herewith may be presented.

Respectfully submitted,

ELMER W. ROLLER,
*Circuit Judge.*

Dated: April 11, 1960.

Nos. 59 and 60. August Term, 1960.

STATE OF WISCONSIN: IN SUPREME COURT.

## OPINION OF WISCONSIN SUPREME COURT.

Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO,
*Appellant*,

*vs.*

Wisconsin Employment Relations Board,
*Respondent*.

Wisconsin Employment Relations Board,
*Respondent*.

*vs.*

Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO,
*Appellant*.

APPEAL from two judgments of the circuit court for Milwaukee county: ELMER W. ROLLER, Circuit Judge. *Reversed*.

In Case No. 59, Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO (hereinafter referred to as the "Union"), instituted a proceeding for review, pursuant to the Wisconsin Administrative Procedure Act (ch. 227, Stats.), of an order entered by the Wisconsin Employment Relations Board (hereinafter referred to as "W. E. R. B."). In Case No. 60, W. E. R. B. petitioned the circuit court pursuant to

sec. 111.07 (7), Stats. for enforcement of the order as to which review was sought by the Union in Case No. 59. The two proceedings were consolidated by the circuit court for the purpose of hearing and determination.

At all times material to the instant litigation the Union was the exclusive collective bargaining agent for the production and maintenance employees of the Allis-Chalmers Company (hereinafter referred to as the "Company") at its plant in the city of West Allis, having been so certified by the National Labor Relations Board. On August 15, 1958, the labor agreement existing between the Union and the Company expired. After protracted negotiations between the parties with respect to the terms of a renewal agreement an impasse was reached. Thereupon, the executive board of the Union on February 7, 1959, called a strike. This strike had been previously authorized by a secret ballot taken of the members of the Union on August 13, 1958. The strike terminated on April 20, 1959, when a new labor agreement was entered into between the parties.

During the strike the Union picketed the Company's plant. There is no claim made that such picketing was anything but peaceful. While the strike was in progress the Company kept its plant open and work was available for any employee who wished to avail himself of it. Certain members of the Union crossed the picket line and continued to work in the plant. At a well publicized Union meeting held February 7, 1959, the president of the Union had warned that any member who crossed the picket lines and worked during the strike would be tried by the Union and fined after the strike ended. Later letters dated February 24, 1958, were sent out by the executive board of the Union to a number of the members who had crossed the picket lines and continued to work for the Company. These letters pointed out that such action constituted a violation of the

Union constitution and by-laws and subjected each violator to a fine up to $100 for each offense, and that each day worked might well constitute a separate offense.

Following settlement of the strike, charges were filed with the Union against the offending members who had crossed the picket lines and continued to work. Trial committees were chosen to try such offenders. Before completion of such trials, the Company and nineteen Union members, who were then being tried; filed a complaint with W. E. R. B. charging that the Union conduct constituted coercion of the individual complainants in the exercise of their rights under sec. 111.04, Wis. Stats., and that the Union had been guilty of an unfair labor practice under secs. 111.06 (2) (a), Wis. Stats.

In the trials before the Union trial committees the offending members were represented by counsel. All nineteen, who were complainants in the W. E. R. B. proceeding, were found guilty and fined in various amounts ranging from $10 to $100 each. No claim is made that such trials and fines did not conform to the provisions of the Union's constitution and by-laws.

The by-laws of the Union do not permit resignation from membership except during a ten-day period prior to January first of each year. The last period for withdrawal from Union membership prior to the strike expired January 1, 1959.

W. E. R. B. conducted a hearing with respect to the complaints filed which charged that the Union had been guilty of an unfair labor practice. Under date of September 28, 1959, W. E. R. B. entered its findings of fact, conclusions of law, and order wherein it was determined: (1) that the activities of the Union were "neither prohibited by, nor protected by the National Labor Relations Act, 1947, as amended;" (2) that such activities, whereby the Union had

threatened to impose fines upon the individual complainants who had crossed the picket lines, constituted an attempt to coerce the latter and other employees similarly situated in the enjoyment of legal rights guaranteed by sec. 111.04, Stats., and (3) that the Union immediately cease and desist from threatening any employee of the Company with punishment by imposition of a fine because such employee had crossed a picket line. One of the three members of W. E. R. B. filed a dissenting memorandum in which he held that there was federal preemption which prohibited state action, and expressed the further opinion that, even if W. E. R. B. had jurisdiction, the charged activities of the Union would not constitute an unfair labor practice under ch. 111, Wis. Stats. Subsequently an amended cease and desist order was entered dated October 27, 1959.

The Union timely instituted proceedings for review in the circuit court of Milwaukee county, and W. E. R. B. applied to such court for enforcement of its amended order. After a hearing, the circuit court filed a memorandum opinion upholding the determination made by the majority members of W. E. R. B. Judgments were accordingly entered under date of April 22, 1960, one of which dismissed the Union's petition for review, and the other decreed enforcement of W. E. R. B.'s amended order. From such judgments the Union has appealed to this court.

CURRIE, *J.* The parties have stipulated that the Company is engaged in business affecting interstate commerce within the meaning of the Labor Management Relations Act, 1947. The principal issue on this appeal is whether there exists federal preemption under such Act which would preclude W. E. R. B. from exercising any jurisdiction over the activities of the Union which were the subject of the complaints before it. A second issue is presented as to whether such activities constituted conduct prohibited by

the Wisconsin Employment Peace Act (ch. 111, Wis. Stats.), in the event it should be determined that there is no federal preemption. Because of the disposition made of the preemption issue we find it unnecessary to pass on such second issue.

In resolving the issue of preemption it is essential that we first examine the pertinent provisions of the Labor Management Relations Act and the Wisconsin Employment Peace Act. We deem these to be the following:

*Sec. 7 of the Labor Management Relations Act*, 29 USCA, sec. 157. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

*Sec. 8 (b) (1) of the Labor Management Relations Act*, 29 USCA, sec. 158 (b) (1). "(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *"

Sec. 111.04, Wis. Stats:

"Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or

other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

Sec. 111.06 (2) (a), Wis. Stats.:

"It shall be an unfair labor practice for an employee individually or in concert with others:

"(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family."

An examination of the abovequoted statutory provision discloses that Sec. 111.04, Wis. Stats., provides substantially the same as does Section 7 of the Labor Management Relations Act. Likewise Sec. 111.06(2)(a), Wis. Stats., corresponds closely to the aforequoted portion of Section 8(b)(1) of the Labor Management Relations Act except for the proviso provision of the latter, which reads as follows:

"Provided, That this paragraph shall not *impair the right* of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein:" (Italics supplied.)

The parties concede that a fine imposed by a union pursuant to its constitution and by-laws upon a member, who has violated such constitution and by-laws by crossing a picket line during a strike in order to continue his employment, is a union activity embraced within the scope of such proviso. If it were not, then there clearly would be preemption because, if the union conduct at issue here constitutes illegal coercion, it would be prohibited under the federal Act as well as the Wisconsin Employment Peace Act. Therefore, the crucial question is whether Congress by insertion of such proviso intended to make such an ac-

tivity a protected one, or whether it intended that such union conduct should remain outside of the scope of Congressional regulation so that the states might regulate it if they so desire. It is the latter interpretation that was adopted by the majority members of W. E. R. B. and the trial court.

One of the more recent, as well as informative, decisions of the United States Supreme Court on the issue of preemption under the Labor Management Relations Act is that of *San Diego Unions v. Garmon* (1959), 359 U. S. 236, 79 Sup. Ct. 773, 3 L. Ed. (2d) 775. The test of preemption in the labor relations field laid down in that decision is whether the activity "is arguably within the compass of sec. 7 or sec. 8 of the [Labor Management Relations] Act." If it is, then the state's jurisdiction is displaced and the issue must be decided by the National Labor Relations Board and not by the court or the states. This is because that is the agency which Congress has clothed with authority to determine such issue. The failure of such board to define the legal significance under the Act of a particular activity does not give the states power to act. Of particular significance is the following statement appearing at page 246 of the opinion:

> "The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."

In such decision in the *Garmon Case* the United States Supreme Court did point to a type of activity that is not arguably within the compass of Sections 7 and 8 of the Labor Management Relations Act when it declared (at pp. 243, 244):

> "However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire

localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was *a merely peripheral concern* of the Labor Management Relations Act. See *International Assn. of Machinists* v. *Gonzales*, 356 U. S. 617 [78 Sup. Ct. 923, 2 L. Ed. (2d) 1018]." (Emphasis supplied.)

The aforequoted statement, with its reference to the *Gonzales Case*, is most pertinent because such case has been cited by counsel on both sides of the instant appeal, and in the memorandum opinion of the learned trial judge. In that case Gonzales brought suit against the union in a California state court for restoration of his union membership and for damages, claiming that his expulsion from the union violated the union constitution and by-laws. Gonzales secured judgment in his favor which was affirmed by the California district court of appeals. The California Supreme Court refused to accept an appeal to it, and the union then appealed to the United States Supreme Court. There the union did not question that part of the judgment which restored membership to Gonzales, but contended that there was federal preemption under the Taft-Hartley Act which precluded the state court from granting relief in the form of damages. The United States Supreme Court disposed of such argument by stating (at pp. 621-622):

"The possibility of conflict from the court's award of damages in the present case is not greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. This is emphasized by the fact that the subject matter of the litigation in the present case, as the parties and the court conceived it, was the breach of a contract governing the relations between respondent and his unions."

In the case of *United Automobile, A. & A. W. Workers* v. *Woychik* (1958), 5 Wis. (2d) 528, 93 N. W. (2d) 336, this court affirmed the judgment of the trial court in favor of the plaintiff union in an action to collect a fine against a union member for failure to picket during a strike. The union constitution and by-laws provided for the imposition of such a fine. Such provisions of the union constitution and by-laws were held to constitute a contract which the union was entitled to enforce by court action. Under the wording of the proviso of Section 8(b)(1)(A) of the Labor Management Relations Act, such a contract does not fall within the prohibitions of such Act. The aforequoted extract from the decision of the United States supreme court in *International Assn. of Machinists* v. *Gonzales, supra,* clearly indicates that the enforcement by state courts of rights arising under such a contract is too remotely related to the public interest sought to be protected by the Labor Management Relations Act to require a holding that there exists preemption under such Act.

The matters of public interest with which Congress sought to deal in enacting such Act are clearly made manifest by Section 1 thereof, 29 USCA, sec. 151. One expressed purpose of such enactment was to correct the "*inequality of bargaining power* between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association" by encouraging and protecting the exercise by workers in employments affecting interstate commerce of free collective bargaining.

When the provisions of Section 7, together with that of the proviso of Section 8(b)(1)(A), of the Act are construed together, it can well be argued that Congress has spelled out the balance of bargaining power it desires to maintain between unions and employers in employments

affecting interstate commerce. This being so, then any attempt by the states to regulate union activity in such a way as to disrupt such balance would be an invasion of a field of regulation already preempted by Congress. This is the view voiced by Professor Archibald Cox of Harvard Law School in an address to the Section of Labor Relations Law of the American Bar Association at its 1958 annual meeting (Report of the 1958 Proceedings of such Section, p. 21):

> "Freedom to strike, to picket and to use other economic weapons affects the progress of union organization and the balance of power in collective bargaining. The progress of unionization and the balance of power affect the way collective bargaining works. * * * Since freedom to negotiate terms of employment implies freedom to reject the terms proposed by the other party, the framework necessarily includes the law of strikes and picketing. At each point formulating the national labor policy involved balancing the various interests of management, union, employees and public in union organization and collective bargaining as methods for establishing terms and conditions of employment. Any state law which affects the balance is inconsistent with the national labor policy embodied in the L. M. R. A. and, under the supremacy clause, cannot be applied in situations affecting interstate commerce."

A union without power to enforce solidarity among its members, when it resorts to a strike in an effort to force an employer to agree to its collective bargaining demands, is a much less effective instrument of collective bargaining than a union which possesses such power. Therefore, there is an intimate connection between the right of a union to fine members, who cross a picket line in order to continue to work during a strike called by the union, and the incidents of collective bargaining sought to be regulated by the Labor Management Relations Act. In view of this, it

is difficult for us to conceive that such union activity is of "a merely peripheral concern of the Labor Management Relations Act."

That there is an intimate connection between the ability of a union to fine a member, who crosses a picket line in order to continue to work during a strike called by the union, and collective bargaining is supported by an opinion rendered by the Court of Appeals for the Sixth Circuit in *Sanders* v. *International Assn. of Bridge, Structural & Ornamental Iron Workers* (1956), 235 Fed. (2d) 271. There the court had before it the issue of the legality of a provision in a union constitution which was broad enough in scope to permit the expulsion for life of a member found guilty of violating certain other provisions of such constitution. The plaintiff Sanders had been so expelled for life. In passing on such issue the court declared (at p. 272):

> "[T]he legal right of the union to take such action is recognized in the Labor Management Act, 29 USCA, par. 158(b)(1)(A), where it is provided that the law 'shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.' The expulsion and debarment of appellant Sanders for life was a valid exercise by the union of its powers under its constitution and a legal exercise of its rights under the pertinent statute. As has been well said, '*A union must have authority to discipline its members, otherwise it will have no power to bargain effectively.* [Citing Note in Villanova Law Review, January, 1956, p. 190]'." (Emphasis supplied.)

Thus it is apparent that the arguments in favor of holding that the activity of a union which fines a member for crossing a picket line in violation of the union's constitution and by-laws is protected by the Labor Management Relations Act, are too potent to permit us to determine that

such activity is not "arguably within the compass of sec. 7 or 8 of the Act." This being the case, no state agency or court, but only the National Labor Relations Board, has jurisdiction to determine whether such activity is protected by the proviso of Section 8(b)(1)(A) of the Act. *San Diego Unions* v. *Garmon, supra.*

There are at least three decisions of the National Labor Relations Board in which it has been called upon to interpret the effect of such proviso.

The first of these is *International Typographical Union* (1949), 86 NLRB 951. In that case one of the activities of the union, which was contended to be an act of coercion prohibited by Section 8(b)(1)(A) of the Act, was threatening union members with expulsion if they failed to follow certain union prescribed collective bargaining procedures. The National Labor Relations Board held that such "argument is squarely at odds with the unambiguous language of the proviso to Section 8(b)(1)(A), and the legislative scheme as a whole, and must therefore be rejected." By footnote to this holding the board quoted the language of such proviso and stated:

> "It is unnecessary to do more than to mention the *guarantee of a right* to 'prescribe' rules extends to the enforcement of such rules as well." (Emphasis supplied.)

The second pertinent decision of the National Labor Relations Board interpreting such proviso is that of *Minneapolis Star and Tribune Co.* (1954), 109 NLRB 727. There the board was concerned with a $500 fine which had been imposed by the union on a member, one Carpenter, because of his failure to take part in picketing during a strike. The board approved the holding of its trial examiner that the proviso of Section 8(b)(1)(A) of the Labor Management Relations Act precluded it from interfering with the im-

posing of such fine by the union. There was incorporated into the decision the report of the trial examiner. It appears from such report that the general counsel for the board took the position that the imposition of such fine constituted an act of coercion prohibited by such Section 8(b)(1)(A). The trial examiner rejected such contention and declared (at p. 738):

> "Congressional recognition of a labor organization's right to make its own rules presumes, of course, its right to invoke them—except where the implementing of such rules is expressly prohibited, as in the case of affecting an employee's employment rights."[1]

One of the most recent decisions by the National Labor Relations Board, in which it was called upon to interpret such proviso, is *Allen Bradley Company* (1960), 127 NLRB No. 8. There the company, as a condition to entering into a new collective bargaining agreement with the union, insisted that the union agree in principle to certain company proposed contract clauses. Under these clauses the union would be precluded from restraining or coercing any of its members by "discipline, discharge, fine or otherwise" from exercising any of their rights guaranteed by Section 7 of the Labor Management Relations Act. Thus such a clause would have prohibited the union from fining members who crossed a picket line and continued to work during a strike in violation of the union's constitution and by-laws. The board in its decision stated:

> "Respondent [employer] has, by the breadth of this clause, encompassed in its proposals, and sought to bargain about, virtually every form of internal union discipline, including disciplinary powers expressly reserved to unions by the proviso to Section 8(b)(1)(A)

1. In the instant appeals no question was raised that the provisions of the Union's constitution and by-laws providing for the imposition of the fines upon the employees, who crossed the picket lines, violated the employment rights of such employees.

> of the Act. * * * By thus intruding on *rights guaranteed* to Unions by the Act, Respondent's proposed clauses clearly fell outside the scope of mandatory bargaining. Accordingly, we find that Respondent violated Section 8(a)(5)[2] by insisting at negotiations that the Union agree to such proposals." (Emphasis supplied.)

The foregoing quotations from decisions of the National Labor Relations Board make it abundantly clear that such board interprets the proviso as having the effect of making the enforcement by a union of its own constitution and by-laws a protected activity under the Labor Management Relations Act. We deem that such interpretation is certainly a permissible one in view of the use by Congress of the word "*right*" in the proviso when referring to the union activity of prescribing rules for acquisition and retention of membership.

Therefore, we conclude that such interpretation by the National Labor Relations Board is controlling on the issue of preemption, and that W. E. R. B. was without jurisdiction in the instant proceedings.

*By the Court.*—Judgments reversed and causes remanded with directions in Case No. 59 to vacate and set aside the order of the Wisconsin Employment Relations Board.

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2. Sec. 8(a) (5) of the Act is the provision which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees".